COA NO. 43737-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

THOMAS ESPEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Linda Lee, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's CrR 3.6 motion to suppress evidence. CP 30.

2. The court violated appellant's constitutional right to a public trial during jury selection.

3. The prosecutor improperly commented on appellant's exercise of his constitutional rights to pre-arrest silence and counsel.

Issues Pertaining to Assignments of Error

1. Whether the court erred in failing to suppress evidence because the affidavit in support of the search warrant failed to establish timely probable cause that evidence of the crime would be found in the location to be searched?

2. Whether the court violated appellant's right to a public trial in each of the three trials because the court did not analyze the requisite factors before conducting portions of jury selection in private?

3. Whether the prosecutor improperly commented on appellant's constitutional rights to pre-arrest silence and counsel by exploiting evidence that appellant did not seek out police to tell his story before his arrest and consulted with counsel during that time period?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged William Espey with first degree robbery (count I), first degree burglary (count II), first degree unlawful possession of a firearm (count III), possession of a stolen firearm (count IV) and unlawful possession of a controlled substance (count V). CP 5-7.

Counts I and II were severed from counts III, IV and V for separate trials, with the latter counts to be tried first. 1RP[1] 2-7. The prosecutor agreed to sever because he did not see a nexus between the assault/robbery and the firearm and drugs found in a car six weeks later. 1RP 3-4.

The defense filed a CrR 3.6 motion to suppress the firearm and drug evidence recovered from the car on the ground that the warrant was stale and there was no nexus between the crime and the place searched. CP 8-12. The court denied the motion to suppress, finding a nexus and adequate freshness. CP 30.

[1] The verbatim report of proceedings is referenced as follows: 1RP – 9/22/11; 2RP – five consecutively paginated volumes consisting of 3/8/12, 3/12/12, 3/13/12, 3/14/12, 3/15/12; 3RP – 3/8/12 (trial #1 voir dire); 4RP – 3/14/12 (trial #2 voir dire); 5RP – 3/15/12 (trial #2 voir dire); 6RP – 3/19/12; 7RP – 3/20/12; 8RP – 3/21/12; 9RP – six consecutively paginated volumes consisting of 6/5/12, 6/11/12, 6/18/12, 6/19/12, 6/20/12, 7/20/12; 10RP – 6/11/12 (trial #3 voir dire).

At the first trial, the jury hung on count III and convicted on count V. CP 136-37; 2RP 267, 269. Count IV was dismissed due to insufficient evidence. 2RP 161; CP 239. At the second trial, the jury acquitted on count I and convicted on count II. CP 175-77; 8RP 6-7. At the third trial, the jury convicted on count III. CP 227.

The court imposed an exceptional sentence of 232 months confinement by running count II consecutive to counts III and V. CP 239, 241-42, 252-55. This appeal timely follows. CP 228 .

2. The First Trial: Counts III, IV and V

Police arrested Espey at a gas station based on an outstanding warrant and impounded the car he was driving. 2RP 25, 33-34. Police obtained a search warrant for the car and found a gun in the trunk and methamphetamine in the center console of the passenger compartment. 2RP 29, 38, 54, 57, 95.

3. The Second Trial: Counts I and II

a. Testimony of Campbell and Bischof:

Sonny Campbell was at home with his girlfriend Kimberly Bischof[2] and Donny Resnick. 6RP 20, 22, 57. The door was open. 6RP 28. Espey, Mario Falsetta and two unknown men entered the residence without Campbell answering the door. 6RP 22-24. They came down the

[2] Bischof had convictions for crimes of dishonesty. 6RP 74.

hallway of the house. 6RP 22-23, 39-40, 59, 61, 63. Campbell and Bischof knew Espey through friend Katie Bass. 6RP 21, 60.

Espey came toward Campbell with the three others behind him. 6RP 30. Campbell asked what Espey was doing there. 6RP 23, 61. The men accused Campbell of drugging and raping Bass. 6RP 22-23, 24-25, 62. Campbell professed ignorance. 6RP 62.

Bischof locked herself in the bedroom. 6RP 26, 62. Espey put on gloves and grabbed Campbell by the collar. 6RP 23, 30. Three men beat Campbell while he was cornered in the bathroom. 6RP 24-25, 62. Campbell claimed at trial that Espey punched him.[3] 6RP 25, 27.

Mario Falsetta kicked the bedroom door in and told Bischof to sit on her hands. 6RP 62-64. The fighting in the bathroom was ongoing, the men taking turns hitting Campbell. 6RP 64, 70.

The men left after someone arrived at the residence. 6RP 64-65. Bischof called the police shortly thereafter. 6RP 63. Campbell said blood was coming from his ear after the beating. 6RP 28. A responding officer photographed injuries to Campbell's ear and neck. 6RP 9, 12-13.

A bank bag with money and drugs in it, a cell phone, jewelry, a paint ball gun and a laptop computer were taken from the bedroom. 6RP 26-27, 34, 64-67, 72. Campbell did not know who took the bag of money

[3] Campbell did not tell the police that Espey hit him. 6RP 30-31.

and drugs. 6RP 32. Bischof said Mario took the bag and phone and that one of the other men she did not know took the paint ball gun. 6RP 66-67. Other than Mario Falsetta, she could not say for sure who took what. 6RP 67, 70. Espey walked into the bedroom at some point but Bischof did not remember what Espey did after that. 6RP 64.

Campbell was a methamphetamine addict. 6RP 27. He had consumed the drug the previous day. 6RP 32. Methamphetamine affected his perception and memory at times, and its effect could last for days. 6RP 32.

Campbell offered to drop the charges or change his testimony to "say it doesn't look like him" if a vehicle was given to "charity," but denied seeking the vehicle for himself. 6RP 34-35. Espey later called Bischof and said he was sorry. 6RP 35-36.

b. Resnick's Testimony

Donny Resnick testified for the defense. 6RP 76. He lived with Campbell and was home at the time of the incident. 6RP 77. He was acquainted with Espey but they were not close friends. 6RP 76.

According to Resnick, Espey, Mario Falsetta and another person came to the door and hollered for Campbell. 6RP 77. Campbell came up front and waved them in. 6RP 77. There was no invasion. 6RP 82. Resnick watched Campbell let the men into his home. 6RP 82.

Espey talked with Campbell in the bathroom about whether Campbell had drugged Katie Bass. 6RP 77-78. Resnick did not see anyone get assaulted and did not hear the sound of a struggle or assault. 6RP 80, 82, 91. Given Resnick's proximity to the bathroom, Campbell could not have been beaten without Resnick hearing it. 6RP 80, 82, 91.

Resnick saw injuries to Campbell afterward, but pointed out that five minutes before the men arrived, Campbell had come home and hurriedly went straight to the bedroom before Resnick could see his face. 6RP 77, 80, 83-84. The damage to Campbell's face that Resnick noticed after the men left could not have been done without making a noise that Resnick would have heard. 6RP 92, 95.

The men walked back out of the house and left. 6RP 79. They casually walked out as casually as the came in. 6RP 83. The men were not carrying anything. 6RP 79-80.

Campbell and Bischof remained in the bedroom for 10 minutes together. 6RP 84-85. Then Bischof came out and told Resnick to call the cops because Campbell had been robbed. 6RP 79-80. Resnick left because he had a warrant out for his arrest and did not want to wait for the police to show up.[4] 6RP 79, 84.

[4] He had convictions for crimes of dishonesty. 6RP 81.

Resnick was aware that Campbell had issues with others over debts. 6RP 80. Campbell had a gambling problem. 6RP 82. Resnick said he came forward to testify because could not see an innocent man go to prison. 6RP 82. He believed Campbell was trying to clear his debts by concocting a phony story about the robbery. 6RP 82.

c. Espey's Post-Arrest Statement

Police located Espey on May 25 and arrested him. 6RP 41, 44. A detective interrogated him that same day. 6RP 47; Ex. C.[5]

Espey told the detective that he went over to Campbell's residence to talk to him about the rape of his friend Bass. Ex. C at 3-4. Mario Falsetta and another man named Casey followed him over. Id. at 6-7. Two other men named Bill and Gary were standing outside the residence when Espey arrived. Id. at 6, 9, 17.

Espey knocked on the door. Id. at 7. Campbell said to come in before he realized who it was. Id. at 7, 26. Espey went into the living room. Id. at 7. Campbell said, "hey, what's up." Id. Espey responded he came to talk to Campbell about something. Id. Campbell said he didn't do it, without even asking why Espey had come over. Id. Espey became angry and started arguing about the rape. Id. at 8. As Espey grabbed

[5] Exhibit C is the transcript of the interrogation, admitted as an illustrative exhibit to the recording. 6RP 54-55.

Campbell by the shirt collar, Casey slipped underneath, grabbed Campbell, and shoved him into the bathroom. Id. at 8, 11, 16. Espey denied punching Campbell. Id. at 13.

Casey and Campbell started fighting. Id. at 8. Espey did not believe in "putting two on one," so he just backed up. Id. at 9. Campbell curled up in a ball as Casey struck him with his fists. Id. at 9. Mario Falsetta also argued with Campbell and hit him a couple of times. Id. at 9, 10. Campbell later offered to not testify against Espey if he "donated" his tow truck to Campbell. Id. at 20.

Espey denied robbing anyone or intending to rob anyone. Id. at 3, 9, 14, 19, 26. He just went over there to talk to Campbell. Id. at 9. He did not go over there to rough Campbell up. Id. at 16. He later heard the other men had taken drugs and other things from Campbell's residence, but he denied being a part of any robbery. Id. at 11-15. Espey did not see the other men take anything when he was there. Id. at 14, 15. Espey denied being with the other men because he took his own truck over to Campbell's house. Id. at 13.

During the course of interrogation, the detective asked, "When did you see Chip Mosley?" Id. at 15. Espey said he called Mosley when he "found out what was going on." Id. Espey had found out the police were looking for him. Id. He knew Mosley was Mario Falsetta's attorney. Id.

at 15. Police told Mosley that "we robbed 'em." Id. Espey learned from Mosley that there was no warrant out for him, but that police had been to his house and one of his previous addresses. Id. Campbell also made arrangements to meet with Mosley. Id. at 22.

The following exchange between the detective and Espey occurred:

> Q: You found out pretty early that we were looking for you, right, the cops were looking for you?
> A: Yeah.
> Q: Why, why didn't you call and say hey, I didn't do this stuff. I wanna give my side.
> A: Yeah, like that's gonna matter.
> Q: I'm just asking what, what your answer is.
> A: Well, one of my friends told me to do that too. Go down turn yourself in that, they'll be easier on you, give you a lower bail and shit. I said I ain't going down there 'till I get money to get a lawyer. That's, we talked to a lawyer about it and (unintelligible). . .
> Q: Um-hm.
> A: (Unintelligible)
> Q: Yeah.
> A: Yeah, we talked to him they said yeah do, do, you know you come down do a video statement and . . .
> Q: Um-hm.
> A: My plans are fucked.
> Q: So, he told you to turn yourself in.
> A: yeah.
> Q: And you said . . .
> A: No, no, no, the lawyer didn't tell me to turn myself in, no. He said . . .
> Q: Thought you said to do a video statement.
> A: He said, he said that he knew (unintelligible) them guys down here and, and that's when they were talking about straightening it out. I said I ain't (unintelligible) nothing. You know, they, they can do whatever.

> Q: Oh.
> A: My friend Dave, he said fuck it. What you need to do is get (unintelligible) attorney's office and then when the attorney said the only thing we can do is tell him to go to prosecutor and you know straighten it out with him. But he told me come down here and, and do a video tape, you know do a video statement. Then . . .
> Q: Yeah.
> A: turn myself in. He, he'd go with me to the judge.
> Q: Okay.
> A: But he want a thousand dollars. I didn't even have a thousand dollars to give him for that.

Ex. C at 22-24.

4. The Third Trial: Count III

Evidence in the third trial was consistent with what was presented in the first trial. Police arrested Espey at a gas station based on an outstanding warrant and impounded the car he was driving. 9RP 36, 44, 53-54. Police obtained a search warrant for the car and found a gun in the trunk. 9RP 54, 65-66. The parties stipulated Espey had previously been convicted of a serious felony offense. 9RP 128.

C. ARGUMENT

1. THE SEARCH WARRANT FOR THE VEHICLE IS UNSUPPORTED BY PROBABLE CAUSE DUE TO LACK OF NEXUS AND STALENESS.

A search warrant must not issue unless there is probable cause to conduct the search. State v. Lyons, 174 Wn.2d 354, 359, 275 P.3d 314 (2012); U.S. Const. amend. IV; Wash. Const. art. I, § 7. "To establish

probable cause, the affidavit must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched." Lyons, 174 Wn.2d at 359.

The trial court erred in failing to suppress evidence found in the car Espey was driving. CP 30; 1RP 34-36. The search warrant affidavit did not establish probable cause to search that location. There was no nexus between the criminal activity and the car. In addition, the warrant was stale. The warrant therefore failed to satisfy the requirements of article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution.

a. Standard Of Review

The issuance of a search warrant is generally reviewed for abuse of discretion. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). While deference is owed to the magistrate, that deference is not unlimited. Lyons, 174 Wn.2d at 362. No deference is given "where the affidavit does not provide a substantial basis for determining probable cause." Id. at 363.

The trial court's assessment of probable cause, its conclusions of law and application of law to the facts are all reviewed de novo. Neth, 165 Wn.2d at 182; State v. Meneese, 174 Wn.2d 937, 942, 282 P.3d 83 (2012); State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). In

determining the validity of a search warrant, the reviewing court considers "*only* the information that was brought to the attention of the issuing judge or magistrate at the time the warrant was requested." State v. Murray, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988). In other words, review is limited to the four corners of the affidavit. Neth, 165 Wn.2d at 182.

b. Summary Of The Affidavit In Support Of The Search Warrant.

A home invasion robbery occurred at the Campbell residence on April 8, 2011. CP 20. Four or five white males kicked in the door. CP 20. After assaulting Campbell, the suspects took money, rings, a cell phone, a paint ball gun and a laptop. CP 21, 22. The suspects fled in a blue 80's Chevy truck. CP 20. Campbell identified Espey and Mario Falsetta as suspects. CP 20- 22. Deputy Reigle was familiar with Espey and had arrested him at least twice over the years. CP 20.

The affiant stated "I have received information that Thomas Espey is aware that he is being sought after for the listed charge and that there is a warrant for his arrest. Espey is taking extreme measures to elude capture at this time by distancing himself from co-participants in this case and avoiding areas of which he is known to frequent." CP 22.

An anonymous confidential informant told police that he knew where Espey was spending the majority of his time. CP 22. The affiant

states "Through this information I have been able to determine patterns in Espey's activity. I have also been able to establish several locations that he spends the majority of his 'sleeping' hours." CP 22.

On May 25, 2011 — more than six weeks after the burglary/robbery occurred — police observed Espey driving a green Cadillac ("the listed vehicle") registered to one Amy Dolsky-Badten. CP 20, 23. Espey pulled into a gas station, exited the vehicle and went inside. CP 23. Police arrested Espey. CP 23. When asked if he knew why he was being arrested, Espey replied "For some robbery or some shit that I didn't do." CP 23. The Cadillac was placed in secure storage until a search warrant could be obtained. CP 23.

Espey gave his version of events during subsequent interrogation. CP 23. According to Espey, he went over to Campbell's house to confront him about an allegation that he had drugged and raped a woman. CP 23. Espey drove his own truck over to Campbell's residence. CP 23. Mario Falsetta and a man named Casey followed him over. CP 23. Two other men were already at the residence. CP 23. They knocked on the door and were invited inside. CP 23-24. Espey lunged to grab Campbell but Casey snuck past and started hitting Campbell. CP 24. A fight broke out. CP 24. Espey got in his truck and left the area. CP 24. Espey later heard the

other men took items from Campbell's residence. CP 24. Espey felt he had not done anything wrong. CP 24.

Based on these facts, the affiant claimed evidence from the burglary/robbery was in the Cadillac. CP 20. The evidence sought included items taken during the course of the burglary/robbery and weapons of "any type." CP 19. The affidavit does not show a weapon of any type was used during the burglary/robbery.

A judge signed the warrant. CP 27-28. Police then searched the Cadillac and found a firearm and methamphetamine inside.[6] CP 9. Espey moved to suppress this evidence due to lack of probable cause supporting the warrant. CP 8-12. Espey argued the warrant was stale and there was no nexus between the crime and the place searched. Id. The trial court denied the suppression motion. CP 30; 1RP 34-36.

c. There Was No Probable Cause To Believe Evidence Of Criminal Activity Would Be Found In The Car.

Search warrants are valid only if supported by probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause to search "requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." Thein, 138 Wn.2d at 140 (quoting State v. Goble, 88 Wn. App.

[6] Police did not find any evidence of the stolen property associated with the Campbell burglary/robbery. CP 9.

503, 509, 945 P.2d 263 (1997)). The affidavit in support of the warrant must set forth facts and circumstances sufficient to establish a reasonable inference that evidence of the crime can be found at the place to be searched. Thein, 138 Wn.2d at 140.

A warrant to search for evidence in a particular place must be based on more than generalized belief of the supposed practices of the type of criminal involved. Thein, 138 Wn.2d at 147-48 (addressing drug dealers). Rather, the warrant must contain specific facts tying the place to be searched to the crime. Id. "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." Id. at 147.

The warrant to search the Cadillac fails for lack of nexus. There is no information in the affidavit establishing Espey or any other suspect ever used the Cadillac in connection with the burglary/robbery. No fact links that car with the burglary/robbery activity in Campbell's residence. The Cadillac was not at the scene of the crime. No fact shows Espey stored property taken from Campbell in the Cadillac at any time. The affidavit does not even establish Espey's relationship with the Cadillac, other than the fact that he was seen driving it one day more than six weeks after the crime occurred. There is no indication that he was living in the

Cadillac or that he slept in the Cadillac. No fact shows he drove that Cadillac more than the one time police happened to see him doing so. Neither the affiant nor or any other officer observed any evidence of the burglary/robbery inside the Cadillac prior to searching it.

The magistrate must not serve merely as a rubber stamp for the police. State v. Klinker, 85 Wn.2d 509, 517, 537 P.2d 268 (1975); State v. Trasvina, 16 Wn. App. 519, 524, 557 P.2d 368 (1976), review denied, 88 Wn.2d 1017 (1977). Specific facts in the supporting affidavit must establish the nexus between the item to be seized and the place to be searched. Thein, 138 Wn.2d at 145. The affidavit here lacks specific facts tying the Cadillac to the crime. The fact that Espey was a suspect and that he was seen driving the Cadillac more than six weeks after the crime occurred is not enough to establish probable cause that evidence of the crime would be found in the Cadillac. No deference is owed to the magistrate's decision to issue the warrant because "the affidavit does not provide a substantial basis for determining probable cause." Lyons, 174 Wn.2d at 363.

In McReynolds, the Court of Appeals found probable cause lacking to search the defendants' home when the police caught the defendants at the scene of the burglary. State v. McReynolds, 104 Wn. App. 560, 570, 17 P.3d 608 (2000), review denied, 144 Wn.2d 1003, 29

P.3d 719 (2001). The question was whether there was a basis for inferring evidence of *other* crimes would be at the defendants' residence. A pry bar stolen along with a large quantity of other tools several weeks earlier was found at the scene near one of the suspects. McReynolds, 104 Wn. App. at 566, 570. Yet the affidavit failed to establish a nexus between any criminal act and the defendants' residence. Id. There was no reasonable inference grounded in specific fact that the defendants' residence would contain evidence of a prior crime, even though the defendants were connected with a large amount of property stolen several weeks earlier. Id.

There is even less of a nexus in Espey's case because the nature of his relationship to the premises to be searched — the Cadillac — is unknown. No fact established any permanent or continuing relationship with those premises. McReynolds lived in the place to be searched, and yet there was no nexus. Id. It follows that Espey's transient, one-time act of driving the Cadillac is not enough to establish a nexus either.

The trial court nonetheless concluded there was a nexus, stating "Mr. Espey was very difficult to locate in the month or so after this purported assault and burglary occurred. He was sleeping in a variety of different places. It was difficult to track him down even though in the affidavit somebody said -- was it the arresting officer or the affiant said they were familiar with Mr. Espey, or usually when we read these, if

they're familiar with a person, they usually know where they frequent, where they live, where they hang their hat, that kind of thing, and the inability to locate Mr. Espey, I think, further supports the nexus between the idea that these items are just as likely to be with him in his possession as they are to be anywhere else as he did not have, apparently, a permanent place where he would have otherwise kept things." 1RP 35-36.

The trial court was mistaken that police were unable to locate Espey. An anonymous confidential informant told police that he knew where Espey was spending the majority of his time. CP 22. The affiant states "Through this information I have been able to determine patterns in Espey's activity. I have also been able to establish several locations that he spends the majority of his 'sleeping' hours." CP 22. Police knew where he spent his sleeping hours but did not bother to search any of those several locations.

The standard is not whether contraband is "just as likely" to be found in one place as another. 1RP 36. The standard is whether there is probable cause to believe contraband will be found in the specific place to be searched. Thein, 138 Wn.2d at 140. Contraband may be just as likely found in one place as another when there is no good reason to believe contraband is in any particular place. But if there is no probable cause to

believe contraband is in the place to be searched, it does not matter whether the location is as good as any for where the contraband might be.

It is unreasonable "to infer evidence is likely to be found in a certain location simply because police do not know where else to look for it." Id. at 150. "By this rationale, lack of investigation and fewer details might result in a warrant, whereas thorough investigation revealing more about the suspect - and, therefore, potentially more places to look - would not." Id. The record establishes another place to look: the several locations where Espey was sleeping and spending a majority of his time. CP 22. The affidavit does not even show police searched the blue 80's Chevy truck that was seen leaving the scene of the crime. CP 20.

The court remarked that Espey apparently did not have a permanent place to stay where he would have otherwise kept things. 1RP 36. That fact does not establish a nexus between the crime and the Cadillac. No fact in the affidavit shows Espey's relationship to the Cadillac except that he was seen driving it on a particular day six weeks after the crime occurred. The Cadillac did not belong to him. CP 20, 23. No fact shows Espey regularly drove the Cadillac or regarded it as a place to put his belongings, let alone evidence of a crime.

There is a line between probable cause and conjecture. The affidavit in this case crosses that line. Comparison with other cases further illustrates the defect in the warrant.

In Thein, the Washington Supreme Court held there was insufficient nexus between evidence that a person engaged in drug dealing and the fact that the person resided in the place searched. Thein, 138 Wn.2d at 150. The affidavit in that case contained specific information tying the presence of narcotics activity to a certain residence, but not the address to be searched pursuant to the warrant. Id. at 136-138, 150. The affidavit also contained generalized statements of belief, based on officer training and experience, about drug dealers' common habits, particularly that they kept evidence of drug dealing in their residences. Id. at 138-39. The affidavit expressed the belief that such evidence would be found at the suspect's residence. Id. at 139. The Court held such generalizations do not establish probable cause to support a search warrant for a drug dealer's residence because probable cause must be grounded in fact. Id. at 146-47.

The affidavit in Espey's case is so bereft of relevant supporting facts that it does not even state the kind of generalized belief found insufficient in Thein. The affiant here did not state he believed evidence of the crime would be found in the Cadillac based on training and experience. Instead, we have a baldly stated belief that evidence of the

crime would be found there. CP 20. That is not nearly good enough. "The affidavit in support of the search warrant must be based on more than suspicion or mere personal belief that evidence of the crime will be found on the premises searched." State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002).

In Vickers, there was probable cause to search a vehicle belonging to the suspects where, among other facts, the vehicle fit the description of the one used in the robbery and homicide under investigation. Vickers, 148 Wn.2d at 103, 110-11. Unlike Vickers, there are no facts showing the Cadillac was used in the burglary/robbery. And although the affiant stated a belief that weapons would be found in the Cadillac, no basis for that belief was given. CP 19-20. No weapons were used in the crime against Campbell. CP 20.

In Stone, there was probable cause to search the suspect's vehicle and residence for stolen jewelry and cash where (1) police observed the Stone's car at scene of the burglary and at a residence connected with Stone a few days later; (2) Stone was observed leaving that residence in the same car that was observed at the scene of the burglary; (3) arresting officers observed women's jewelry in the car; (4) the affiant was familiar with Stone, knew he had several prior burglary convictions, and had employed the same method of operation used in the present burglary.

State v. Stone, 56 Wn. App. 153, 155, 158-59, 782 P.2d 1093 (1989), review denied, 114 Wn.2d 1013, 790 P.2d 170 (1990).

The affidavit in Espey's case stands in stark contrast to Stone. Unlike Stone, no one observed the Cadillac at the scene of the Campbell burglary/robbery. Unlike Stone, no one observed any evidence of the crime inside the Cadillac prior to the search.

Deputy Reigle was familiar with Espey and had arrested him at least twice over the years, but such criminal history does not contribute to probable cause to search because, at the very least, the affidavit does not recite what those prior crimes were and whether they involved use of a vehicle to store evidence of the crime. CP 20. "Some factual similarity between the past crime and the currently charged offense must be shown before the criminal history can significantly contribute to probable cause." Neth, 165 Wn.2d at 186. "Otherwise, anyone convicted of a crime would constantly be subject to harassing and embarrassing police searches." Id.

Search warrant affidavits should not be read in a hypertechnical manner, but "establishing probable cause is not hypertechnical; it is a fundamental constitutional requirement." Lyons, 174 Wn.2d at 362. A common sense reading of the affidavit does not support probable cause.

d. The Warrant Was Stale.

Even if the affidavit somehow demonstrates a nexus between the crime and the Cadillac, probable cause is still lacking because the warrant was stale. Probable cause must be timely. Lyons, 174 Wn.2d at 357. Facts used to support probable cause "must be current facts, not remote in point of time, and sufficient to justify a conclusion by the magistrate that the property sought is probably on the person or premises to be searched at the time the warrant is issued." State v. Spencer, 9 Wn. App. 95, 97, 510 P.2d 833 (1973). Stale search warrants violate article I, section 7 and the Fourth Amendment. Lyons, 174 Wn.2d at 357, 359.

The issue is whether the affidavit established probable cause to believe property taken from the burglary/robbery would be found in the Cadillac despite the passage of more than six weeks since the crime occurred, during which time the location of the stolen property is unknown.

The issue of staleness arises due to the passage of time between the informant's observations of criminal activity and presentation of the affidavit to the magistrate. Lyons, 174 Wn.2d at 360. "The magistrate must decide whether the passage of time is so prolonged that it is no longer probable that a search will reveal criminal activity or evidence, i.e., that the information is stale." Id. at 360-61. This is a fact-specific inquiry,

but factors include the time between the known criminal activity and the nature and scope of the suspected activity. Id. at 361.

The trial court rejected the defense argument that the stolen items had value and were likely to be sold, stating "I think it's just as likely that they are things of value and they would likely to be kept, and I don't think that the Court, on a motion to suppress, makes a factual finding in that regard as to what might happen to these items." 1RP 35. The court distinguished Espey's case from typical drug cases where there is an extremely short time between participating in a controlled buy or seeing the drugs and the execution of a warrant. 1RP 35. One expects drug evidence to be quickly consumed, the court opined, but "an item like a paint ball gun is a very different thing, and the timeframe for that is very different." 1RP 35.

It is true that drugs and durable items are different things when it comes to the duration of their existence. No doubt the stolen items remained in existence at the time of the search. The relevant question is *where* those items existed in light of the passage of time between the crime and the place to be searched.

The trial court erred in concluding the warrant was not stale. CP 30; 1RP 34-35. The critical time frame for establishing timely probable cause is when the criminal activity is observed. Lyons, 174 Wn.2d at 361.

In this case, over six weeks passed between the occurrence of the burglary/robbery and police observation of Espey driving the Cadillac. CP 20, 23. No information is offered in the affidavit regarding what happened with the stolen loot during that time period. Nothing in the affidavit shows evidence of the crime would be found in the vehicle six weeks after the crime occurred — a vehicle that was not even used in the commission of the crime.

In determining staleness, the tabulation of the number of days is not the sole factor, but is one circumstance to be considered with others, including the nature and scope of the suspected activity. Lyons, 174 Wn.2d at 361; State v. Hall, 53 Wn. App. 296, 300, 766 P.2d 512 (1989). For example, in the context of a marijuana growing operation, probable cause might still exist despite the passage of a substantial amount of time. Lyons, 174 Wn.2d at 361 (citing State v. Payne, 54 Wn. App. 240, 246, 773 P.2d 122 (1989) ("[a] marijuana grow operation is hardly a 'now you see it, now you don't' event"); Hall, 53 Wn. App. at 299–300 (two months between date of informant's observations of marijuana grow and issuance of warrant not too long)).

The location of property taken during the course of the burglary/robbery at issue here is not akin to a marijuana grow operation. Stolen property is inherently mobile. The stolen items described in the

affidavit included money, rings, a laptop, a cell phone and a paint gun. CP 19. These things are easily picked up and moved from one place to another. The nature and scope of the suspected criminal activity involving stolen property is such that the prolonged period of time that elapsed after the burglary/robbery occurred rendered the warrant stale. See People v. Erthal, 194 Colo. 147, 148, 570 P.2d 534 (Colo. 1977) (warrant stale where approximately seven weeks elapsed between observation of stolen tools in suspect's cabinet-making shop and issuance of warrant and no information established suspect continuously engaged in criminal activity or continued to use the stolen tools).

e. The Firearm And Drug Charges Must Be Dismissed Because Evidence From The Car Should Have Been Suppressed.

The search conducted pursuant to a warrant unsupported by probable cause violated article I, section 7 and the Fourth Amendment. Lyons, 174 Wn.2d at 357, 359. The exclusionary rule mandates suppression of evidence obtained as a result of an unlawful search. State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009); State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Evidence of the firearm and the drugs recovered from the car must be therefore be suppressed. Without that evidence, there is no basis to sustain the convictions for first degree unlawful possession of a firearm (count III) and unlawful possession of a

controlled substance (count V). The charges on those counts must be dismissed. See State v. Kinzy, 141 Wn.2d 373, 393-94, 5 P.3d 668 (2000) (no basis remained for conviction where motion to suppress evidence should have been granted); State v. Valdez, 167 Wn.2d 761, 778-79, 224 P.3d 751 (2009) (same).

2. THE COURT VIOLATED ESPEY'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED PORTIONS OF THE JURY SELECTION PROCESS IN PRIVATE.

The court erred in conducting portions of the jury selection process in private during each of the three trials when it failed to justify the closure under the standard established by Washington Supreme Court and United States Supreme Court precedent. This structural error requires reversal of each conviction.

a. Portions Of The Jury Selection Process Were Not Open to The Public.

During the first trial, a sidebar discussion occurred off the record while prospective jurors remained in the courtroom, before the attorneys exercised peremptory challenges. 3RP 118. After the attorneys exercised peremptory challenges and the jury was sworn, the court placed "on the record the challenge for cause taken at sidebar" with regard to juror 24. 3RP 120. The defense moved to excuse juror 24, a law enforcement

officer, for cause at sidebar. 3RP 120. The State objected to removal. 3RP 120. The court granted the challenge for cause. 3RP 121.

After much of the voir dire questioning took place at the second trial, the court summarized for the record that three challenges for cause had been granted pertaining to jurors 4, 7 and 36. 5RP 85. Juror 23 was subsequently questioned about hardship. 5RP 86-87. In response to the court's question, juror 23 said she was asking to be excused. 5RP 90. The court indicated there would be an opportunity for that to occur. 5RP 90. After other jurors were questioned, a sidebar discussion occurred off the record. 5RP 94. The jury panel selection list shows juror 23 was excused for cause. CP 259-62. After the sidebar discussion, the court announced the attorneys would exercise their peremptory challenges. 5RP 94-95. After peremptory challenges were exercised, the court listed the jurors who would serve on the jury for trial. 5RP 95-96. Juror 23 must have been excused for cause at the off the record sidebar discussion because the record shows that is the only time it could have occurred.

Before voir dire started in the third trial, the court told the attorneys "Again, challenges for cause, I ask counsel to please do that at sidebar. I'll give counsel ample opportunity to do challenges for cause when we take breaks. Again, I just don't want to embarrass any of our jurors in the voir dire process by having them challenged in front of the

entire group." 9RP 17. After the jury was sworn at the third trial, the court stated "before we go off the record, I just wanted to make sure the challenges for cause that were discussed in chambers is placed on the record." 10RP 63. Four jurors were excused in chambers. 10RP 63-64.

b. The Trial Court's Failure To Justify The Closure Requires Reversal Of The Convictions.

The federal and state constitutions guarantee the right to a public trial to every defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees to the public and press the right open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Whether a trial court has violated the defendant's right to a public trial is a question of law reviewed de novo. Easterling, 157 Wn.2d at 173–74.

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Wise,

176 Wn.2d at 5-6. The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id. at 6.

Furthermore, "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)).

The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 288 P.3d at 1118 (citing State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)). Here, the trial judge conducted portions of the jury selection process in private.

At the first trial, a challenge for cause was taken at sidebar with regard to juror 24, resulting in the dismissal of that juror. 3RP 120-21. At the second trial, juror 23 was excused for cause at sidebar. 5RP 85, 90; CP 259-62. These actions constituted a violation of the right to public trial. Dismissal of jurors during a courtroom sidebar discussion is a portion of jury selection held outside the public's purview. State v. Slert, 169 Wn.

App. 766, 774 n.11, 282 P.3d 101 (2012). Sidebar discussions are not normally accessible to the public. What took place at sidebar should have taken place in open court.

At the third trial, challenges for cause related to four jurors were discussed in chambers, resulting in the excusal of those jurors. 10RP 63-64. The judge's chamber room is ordinarily not accessible to the public. Wise, 176 Wn.2d at 12. The trial court excluded the public from trial proceedings by holding a portion of jury selection in chambers rather than in public. Slert, 169 Wn. App. at 776; see also State v. Sadler, 147 Wn. App. 97, 106, 193 P.3d 1108 (2008) (removal of Batson[7] hearing into jury room without conducting a proper Bone-Club inquiry violated defendant's public trial right).

Before a trial judge closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access

[7] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986).

must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 10.

There is no indication the court considered the Bone-Club factors before conducting any of the private jury selection processes at issue here. The trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12. The court here erred in failing to articulate a compelling interest to be served by the closure, give those present an opportunity to object, weigh alternatives to the proposed closure, narrowly tailor the closure order to protect the identified threatened interest, and enter findings that specifically supported the closure. Orange, 152 Wn.2d at 812, 821-22. Appellate courts do not comb through the record or attempt to infer the trial court's balancing of competing interests where it is not apparent in the record. Wise, 176 Wn.2d at 12-13.

Because a portion of jury selection was not open to the public, Espey's constitutional right to a public trial under the state and federal constitutions was violated in the first, second and third trials. The violation of the public trial right is structural error requiring automatic

reversal because it affects the framework within which the trial proceeds. Wise, 176 Wn.2d at 6, 13-14. "Violation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal." Id. at 16. Espey's convictions in the first, second and third trials must be reversed due to the public trial violations. Id. at 19.

The State may try to argue the issue is waived because defense counsel did not object to conducting these portions of the jury selection process in a manner that was not open to the public. That argument fails. A defendant does not waive his right to challenge an improper closure by failing to object to it. Id. at 15. The issue may be raised for the first time on appeal. Id. at 9 (citing Brightman, 155 Wn.2d at 514–15). Indeed, a defendant must have knowledge of the public trial right before it can be waived. In re Pers. Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012). Here, there was no discussion of Espey's public trial right before any of the closures. There is no waiver.

3. THE PROSECUTOR IMPERMISSIBLY COMMENTED ON ESPEY'S EXERCISE OF CONSTITUTIONALLY PROTECTED RIGHTS.

"The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984). In the second trial on

the burglary and robbery charges, the State presented evidence of Espey's pre-arrest silence and consultation with counsel and then drew an adverse inference in closing argument that Espey was guilty based on that evidence. Reversal of the burglary conviction[8] is required because the State cannot show its unconstitutional comment on the exercise of Espey's constitutional rights to pre-arrest silence and counsel was harmless beyond a reasonable doubt.

a. The State Presented Evidence That Espey Deliberately Refrained From Speaking To Police Prior To His Arrest And Sought The Assistance Of Counsel, And Then Argued To The Jury That Espey Was Guilty Based On That Evidence.

A detective interrogated Espey following his arrest on May 25, 2011, about six weeks after the event forming the basis for the robbery and burglary charges occurred. The prosecutor introduced the interrogation into evidence as part of the State's case in chief. Ex. C; 6RP 54-55.

During the course of that interrogation, the detective asked Espey "You found out pretty early that we were looking for you, right, the cops were looking for you?" Ex. C at 22. Espey answered "Yeah." Id. The detective then asked "Why, why didn't you call and say hey, I didn't do this stuff. I wanna give my side." Id. Espey answered "Yeah, like that's

[8] Espey was acquitted on the robbery charge. CP 175.

gonna matter." Id. Espey told the detective he did not want to talk to the police until he obtained money for a lawyer. Id. at 23.

The jury also heard that Espey had consulted with attorney Mosley during this time period, after Espey "found out what was going on" and knew the police were looking for him. Id. at 15. That lawyer advised Espey to make a video statement and then turn himself in. Id. at 23-24. The lawyer would then "go with me to the judge." Id. at 24.

The prosecutor highlighted this evidence in closing argument in telling the jury that Espey made up his story about what happened. 7RP 27-29. The prosecutor stated, "Where I suggest you start is, start with his own recorded statement that he gave to the police. *Keep in mind that he had been on the run for approximately six weeks. Keep in mind that he had already consulted with two attorneys, Chip Mosley and Gary Clower. He had lots of time to figure out what story he was going to tell the police.*" 7RP 27 (emphasis added).

The prosecutor further argued "Tom Espey told the officers that he knew the police were after him. He knew the charges were going to be robbery and burglary. *He talked to the lawyers, Mosley and Clower. He told them why he went there.* He didn't deny going. He went there because Katie Bass, his good friend of 20 years, told him that she thinks that she was raped by Sunny [sic]." 7RP 28 (emphasis added).

b. Challenge To Prosecutorial Comment On The Exercise Of A Constitutional Right May Be Raised For The First Time On Appeal.

Defense counsel did not object below, but an appellant may challenge an improper comment on the exercise of a constitutional right for the first time on appeal because it amounts to a manifest error affecting the constitutional right. RAP 2.5(a)(3); State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002) (addressing comment on right to silence); State v. Holmes, 122 Wn. App. 438, 445-46, 93 P.3d 212 (2004) (direct comment on silence is always a constitutional error; indirect comment of constitutional magnitude where State exploits it); State v. Jones, 71 Wn. App. 798, 809-10, 813, 863 P.2d 85 (1993) (comment on right to confrontation was constitutional error that could be raised for first time on appeal), review denied, 124 Wn.2d 1018, 881 P.2d 254 (1994).

c. The Prosecutor Commented On Espey's Exercise Of His Right To Pre-Arrest Silence.

Both the state and federal constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence. U.S. Const. amend. V; Wash. Const. art. I, § 9. The Fifth Amendment privilege against self-incrimination prohibits the State from using a defendant's pre-arrest silence as substantive evidence of guilt. State v. Easter, 130 Wn.2d 228, 237, 922 P.2d 1285 (1996). The State

cannot use a defendant's pre-arrest silence to "suggest to the jury that the silence was an admission of guilt." State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). In light of these principles, the State must not make closing arguments "relating to a defendant's silence to infer guilt from such silence." Easter, 130 Wn.2d at 236. "[W]hen the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article I, section 9 of the Washington Constitution are violated." State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

The State may use pre-arrest silence to impeach the credibility of the defendant if he or she takes the stand and testifies. Burke, 163 Wn.2d at 217. As Espey did not testify, this exception has no application here. "The Fifth Amendment prohibits impeachment based upon the exercise of silence where the accused does not waive the right and does not testify at trial." Id.

Focusing largely on the purpose of the remarks, reviewing courts distinguish between "comments" and "mere references" to an accused's prearrest right to silence.[9] Burke, 163 Wn.2d at 216. A prosecutor's

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[9] The following are examples of impermissible comments on the right to remain silent: (1) Burke, 163 Wn.2d at 222 (prosecution intentionally invited jury to infer guilt from Burke's termination of his interview with a detective; the invited inference was that Burke ended the interview based on the idea that the guilty should keep quiet and talk to a lawyer); (2) Easter, 130 Wn.2d at 233-34, 241 (officer characterized defendant as

statement on a constitutional right to remain silent is not considered a comment on the exercise of that right only if the remark was so subtle and so brief that it did not "naturally and necessarily" emphasize the defendant's prearrest silence. Id. (quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)).

The evidence elicited by the prosecutor in Espey's case and the prosecutor's exploitation of that evidence in closing argument were not

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evasive and a "smart drunk" after defendant refused to answer questions; prosecutor used "smart drunk" theme in closing); (3) State v. Nemitz, 105 Wn. App. 205, 213-15, 19 P.3d 480 (2001) (prosecutor elicited the fact that the defendant carried his attorney's business card, which listed his rights if stopped for suspicion of driving under the influence); and (4) State v. Keene, 86 Wn. App. 589, 594, 938 P.2d 839 (1997) (detective testified defendant did not return telephone calls after being warned that case would be turned over to prosecutor unless defendant contacted detective; in closing, prosecutor asked jury if these were the actions of an innocent man). The following are examples of statements constituting mere references rather than comments: (1) Lewis, 130 Wn.2d at 705-06 (officer testified Lewis denied that anything had happened and "my only other conversation was that if he was innocent he should just come in and talk to me about it"; detective did not say Lewis refused to talk to him, nor did he reveal the fact that Lewis failed to keep appointments, and prosecutor in closing argument did not mention defendant's refusal to speak with the police about the charges or about his failure to keep appointments with the officer); (2) State v. Sweet, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999) (officer's testimony that defendant said he would take a polygraph test after discussing the matter with his attorney; prosecutor did not use evidence in closing argument); and (3) State v. Rogers, 70 Wn. App. 626, 630-31, 855 P.2d 294 (1993) (defendant's refusal to say how much he had to drink in vehicular homicide case not of constitutional proportions because the comment was quickly elicited and then passed over without being highlighted), review denied, 123 Wn.2d 1004 (1994).

mere references. The prosecutor in Espey's case explicitly focused the jury's attention on evidence of Espey's pre-arrest silence in arguing the jury should find him guilty because he waited to talk to police and had time to make up his story.[10]

Again, "comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." Lewis, 130 Wn.2d at 707. The interrogation evidence presented by the State plainly questions why Espey did not talk to police before his arrest. Ex. C at 15, 22-24. The State's closing argument, exhorting the jury to find Espey incredible because he had plenty of time to make up his story prior to his arrest, removed any doubt on the matter. 7RP 27-28.

The prosecutor intentionally invited the jury to infer guilt from Espey's failure to talk to police before his arrest. The invited inference was that Espey did not talk sooner because he needed time to make up a bogus exculpatory story. In this manner the State forged a link between

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[10] There are many reasons an innocent person may choose to remain silent instead of going to the police and telling their story, including awareness of being under no obligation to speak with police, caution that anything said might be used against him at trial, a belief that efforts at exoneration would be futile, explicit instructions not to speak from an attorney, and mistrust of law enforcement officials. Burke, 163 Wn.2d at 218-19 (citing People v. De George, 73 N.Y.2d 614, 618-19, 541 N.E.2d 11, 543 N.Y.S.2d 11 (N.Y. 1989)).

guilt and the time period in which Espey exercised his right to silence. The unmistakable implication is that suspects who have committed no crime will immediately present themselves to the police and tell their side of the story. When the State draws specific attention to silence as evidence of guilt, it violates constitutionally protected silence. Easter, 130 Wn.2d at 236, 241.

d. The Prosecutor Commented On Espey's Exercise Of His Right To Counsel.

Prosecutorial comments regarding the defendant's exercise of his right to counsel are just as improper as prosecutorial comments regarding the defendant's exercise of his right to remain silent. United States v. McDonald, 620 F.2d 559, 562-64 (5th Cir.1980); United States ex rel. Macon v. Yeager, 476 F.2d 613, 615 (3d Cir.), cert. denied, 414 U.S. 855, 94 S. Ct. 154, 38 L. Ed. 2d 104 (1973). "It is impermissible to attempt to prove a defendant's guilt by pointing ominously to the fact that he has sought the assistance of counsel." McDonald, 620 F.2d at 564 (comment that defendant's attorney was present during execution of search warrant on defendant's house violated Sixth Amendment).

The presentation of evidence that Espey consulted with counsel before his arrest coupled with the prosecutor's exploitation of that evidence in closing argument demonstrate an impermissible comment on

the exercise of Espey's right to counsel. "A defendant's decision to consult an attorney is not probative in the least of guilt or innocence." Commonwealth v. Person, 400 Mass. 136, 141, 508 N.E.2d 88 (Mass. 1987) (quoting Zemina v. Solem, 438 F. Supp. 455, 466 (D.S.D. 1977), aff'd, 573 F.2d 1027 (8th Cir. 1978)). The prosecutor nonetheless presented evidence to the jury that Espey consulted with an attorney after Espey "found out what was going on" and knew the police were looking for him. Ex. C at 15, 22-24; 6RP 54-55.

The prosecutor focused the jury's attention on this evidence in closing argument, inviting the jury to reject Espey's exculpatory story because, during the six weeks before arrest and subsequent statement to police, Espey "had already consulted with two attorneys, Chip Mosley and Gary Clower. He had lots of time to figure out what story he was going to tell the police." 7RP 27. Consistent with this theme, the prosecutor further pointed out Espey talked to lawyers about why he went over to the Campbell residence after learning of the charges and knowing that police were after him. 7RP 28.

These were not mere references to Espey's exercise of his right to consult with counsel. Rather, the prosecutor's comments struck at the jugular of Espey's exculpatory story. "A prosecutor may not imply that an accused's decision to meet with counsel, even shortly after the incident

giving rise to a criminal indictment, implies guilt. Neither may she suggest to the jury that a defendant hires an attorney in order to generate an alibi, 'take[ ] care of everything' or 'get . . . [his] story straight.' Such statements strike at the core of the right to counsel, and must not be permitted." Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990).[11]

e. The State Cannot Show The Direct Comment On The Exercise Of Constitutional Rights Was Harmless Beyond A Reason Doubt.

Comment on the exercise of a constitutional right is reviewed under the constitutional harmless error standard. Burke, 163 Wn.2d at 222 (comment on right to silence); Romero, 113 Wn. App. at 790-91; Yeager, 476 F.2d at 616-17 (comment on right to counsel). "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error

[11] See Yeager, 476 F.2d at 614, 616 (prosecutor impermissibly directed jury's attention to fact that defendant had consulted with attorney day after shooting, thereby raising inference that he was, or at least believed himself to be, guilty); Zemina, 438 F. Supp. at 465-66 (prosecutor's argument that defendant's post-shooting call to his attorney was "a telling sign" penalized defendant's exercise of his Sixth Amendment right), aff'd, 573 F.2d 1027 (8th Cir. 1978) (adopting lower court's reasoning); Henderson v. United States, 632 A.2d 419, 433-34 (D.C. 1993) (prosecutor violated defendant's Fifth Amendment right to counsel by eliciting testimony and arguing that defendant had sought legal counsel one day after his wife's murder); People v. Meredith, 84 Ill. App.3d 1065, 1071-73, 405 N.E.2d 1306 (Ill App. Ct. 1980) (prosecutor violated defendant's Sixth Amendment right by commenting that "I submit [the defendant] knew that he had shot those people [and] that is why he went to go call his lawyer").

and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." Burke, 163 Wn.2d at 222.

The comment on Espey's silence and consultation with counsel had the effect of undermining the credibility of his story, as presented to the jury through police interrogation. The comment also improperly presented the exercise of those rights as substantive evidence of guilt for the jury's consideration. See id. at 222-23 (comment on silence not harmless beyond a reasonable doubt where comment undermined defendant's credibility as a witness and improperly presenting substantive evidence of guilt for the jury's consideration).

"Credibility determinations 'cannot be duplicated by a review of the written record, at least in cases where the defendant's exculpating story is not facially unbelievable.'" Holmes, 122 Wn. App. at 447 (comment on right to silence not harmless beyond a reasonable doubt where outcome of trial depended on jury's evaluation of defendant's credibility as compared to the consistent, even compelling testimony of three girls) (quoting State v. Gutierrez, 50 Wn. App. 583, 591, 749 P.2d 213 (1988)).

Espey's exculpatory story was that he did not go over to Campbell's house with the intent to commit a crime but only to talk with Campbell. Ex. C at 3-4, 9. Campbell invited him into his house. Id. at 7,

26. Espey did not beat Campbell up and did not steal anything once inside. Id. at 3, 9, 11-15, 19, 26.[12]

Others who accompanied Espey beat Campbell and stole property, but a rational trier of fact could find the State did not prove Espey was liable as an accomplice to first degree burglary because Espey did not plan or even know that others entered with intent to commit a crime and would beat Campbell up in the process. Id.; see State v. Israel, 113 Wn. App. 243, 288, 54 P.3d 1218 (2002) (an accomplice must have specific knowledge of the general crime charged and aid in the planning or commission of that crime; foreseeability that crime will occur is insufficient to establish accomplice liability), review denied, 149 Wn.2d 1013, 69 P.3d 874 (2003). Whether the jury believed Espey's account was a credibility determination that may have been tainted by the comment on Espey's exercise of constitutional rights.

The prosecutor apparently believed Espey's pre-arrest silence and consultation with counsel was important enough to emphasize to the jury. Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics

[12] Resnick's testimony backed up Espey's contention that Campbell invited Espey and the other men into the residence. 6RP 77, 82. According to Resnick, no assault occurred and he did not see anyone carrying property from the house. 6RP 79-82, 91-92, 95.

unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). The State cannot now plausibly maintain the error was harmless.

D. CONCLUSION

For the reasons set forth, Espey requests that this Court reverse each conviction, dismissing counts III and V with prejudice.

DATED this 13th day of March 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

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Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 43737-6-II
	)	
THOMAS ESPEY,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] THOMAS ESPEY
DOC NO. 938101
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF MARCH 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

March 13, 2013 - 3:23 PM

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Court of Appeals Case Number: 43737-6

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Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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